

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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TUESDAY

JANUARY 15, 2008

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The Special Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Ruthanne G. Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER, Chairperson
MARC D. LOUD, Vice Chairman
SHANE L. DETTMAN, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

MICHAEL G. TURNBULL, FAIA, Commissioner
(OAC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
BEVERLEY BAILEY, Sr. Zoning Specialist
JOHN NYARKU, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

The transcript constitutes the minutes
from the Public Meeting held on January 15,
2008.

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| <u>JEWISH PRIMARY DAY SCHOOL OF THE NATION'S CAPITAL, INC.</u> | |
| <u>APPLICATION NO. 17700</u> | 5 |
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1 P-R-O-C-E-E-D-I-N-G-S

2 10:32 a.m.

3 CHAIRPERSON MILLER: Good morning,
4 ladies and gentlemen. This is the January
5 15th special public meeting of the Board of
6 Zoning Adjustment of the District of Columbia.
7 My name is Ruthanne Miller. I am the Chair of
8 the BZA.

9 Joining me to my right is Mr. Marc
10 Loud who is the Vice-Chair. To my left is Mr.
11 Shane Dettman, member of the Board. With us
12 today also are Lori Monroe from the Office of
13 Attorney General, Cliff Moy and Beverley
14 Bailey from the Office of Zoning.

15 Copies of today's meeting agenda
16 are available to you and are located to my
17 left in the wall bin near the door. We do not
18 take any public testimony at our meetings
19 unless the Board asks someone to come forward.

20 Please be advised that this
21 proceeding is being recorded by a court
22 reporter and is also webcast live.

1 Accordingly, we must ask you to refrain from
2 any disruptive noises or actions in the
3 hearing room. Please turn off all beepers and
4 cell phones at this time.

5 Does the staff have any
6 preliminary matters?

7 MR. MOY: Yes, ma'am, but they can
8 be taken up case by case.

9 VICE-CHAIRPERSON MILLER: Okay.
10 In which case let's proceed with the agenda.

11 MR. MOY: Yes. My understanding
12 is that the first of the two cases on the
13 special public meeting would be Application
14 No. 17700 of Jewish Primary Day School. No?
15 Yes? No?

16 CHAIRPERSON MILLER: I'm sorry.
17 Go right ahead.

18 MR. MOY: Okay. Again, that's
19 Application No. 17700 of Jewish Primary Day
20 School of the National Capital, Inc., pursuant
21 to 11 DCMR 3104.1, and 3103.2 for a variance
22 to allow stacked parking spaces under

1 subsection 2117.4, and a special exception to
2 allow an increase in the number of students
3 from 225 to 275 student and an increase in the
4 number of faculty from 42 to 56 faculty
5 members and the use of a portion of the lot
6 for play area serving an existing private
7 school under section 206 and 352 in the R-1-B
8 and R-5-A Districts at premises 6045 16th
9 Street, N.W. (Square 2726, Lot 824).

10 The Board will recall on December
11 18, 2007, the Board completed public
12 testimony, closed the record, and scheduled
13 its decision on January 15th. To complete the
14 record the Board requested information which
15 is typically filed in applications of this
16 type and draft findings of fact and
17 conclusions of law and specific information
18 addressing the concerns of the adjacent
19 property owner.

20 The filing was submitted and
21 received by the Board from the applicant as to
22 the requested information and the draft

1 findings of fact and conclusions of law
2 identified in your case folders as Exhibit 40
3 and 41 respectively.

4 As a preliminary matter, the Board
5 also received this morning a filing from the
6 adjacent property owner, Dr. Welsing and that
7 is also exhibited in your case folders. The
8 Board is to act on the merits of requested
9 variance and special exception relief.

10 That will conclude the staff's
11 briefing, Madam Chair.

12 CHAIRPERSON MILLER: Thank you,
13 Mr. Moy. Is it your understanding that we
14 would need to waive our rules in order to
15 accept the letter that was filed today by Dr.
16 Welsing?

17 MR. MOY: Yes, that would be the
18 staff's position.

19 CHAIRPERSON MILLER: Okay. Then I
20 would just ask the Board members if we would
21 like to do that. The standard would be no
22 prejudice to a party and perhaps an inability

1 to have filed it earlier. It appears that it
2 has been filed after attempts were made at
3 negotiations so I think that probably goes to
4 the timing.

5 With respect to prejudice I think
6 it is not prejudice for the applicant to have
7 it in the record. However, I would note that
8 when something like this comes in at this late
9 hour the applicant doesn't have an opportunity
10 to respond. The Board has to keep that in
11 mind certainly with respect to evaluating it
12 in our deliberations.

13 So do the Board members have any
14 objection to at least waiving the rules and
15 allowing the letter to be accepted into the
16 record?

17 VICE CHAIRMAN LOUD: I don't.

18 CHAIRPERSON MILLER: Okay. Why
19 don't we do that. Then we can proceed with
20 our deliberations.

21 I guess to start off I would just
22 say this is a fairly straightforward case for

1 a special exception under 206 to increase the
2 number of students from 225 to 275 and faculty
3 from 42 to 46.

4 Starting with that, this property
5 has been used as a school for a very long
6 time, since 1948, so it actually already has
7 special exception relief for that purpose so
8 we were looking at it here to increase the
9 number of students that were actually allowed
10 on the certificate of occupancy that went
11 along with the school that preceded this
12 school.

13 Actually, the history shows that I
14 think way back when it was first found, when
15 the first school was there, I think it had
16 something like 450 students. They also need
17 a special exception for us to consider the use
18 of the play area where there was an adjacent
19 home that they were going to raze and use
20 that.

21 We consider that under 206 as well
22 with respect to whether it would cause any

1 objectionable noise or such. That was a big
2 issue in our case which I think that we are
3 going to be focusing on.

4 Then they are also seeking
5 variance relief from 2117.4 to allow stacked
6 parking. That is the only way that they can
7 meet the parking requirements in 2117.4.
8 Let's look at 206 first. We have that before
9 us.

10 I would just like to apologize for
11 keeping everyone waiting for a while before we
12 even started this meeting. We had some
13 difficulty issues to consider. Not
14 necessarily in this particular case but we
15 needed that time to do that.

16 Looking at this particular case,
17 206, basically when we are considering the
18 number of students and faculty we are looking
19 at whether or not that increase is likely to
20 become objectionable to adjoining and nearby
21 property because of noise, traffic, number of
22 students, or otherwise objectionable

1 conditions set forth in 206.2.

2 I don't recall any testimony that
3 there was concern per se with respect to the
4 increase in the number of students or faculty
5 in this case. The previous school did have
6 more students. I don't really think that was
7 an issue. Increase in faculty and staff did
8 trigger the parking variance which we will get
9 to later.

10 The big issue I recall really in
11 this case goes to the noise that might impact
12 Dr. Welsing who is an adjacent neighbor. We
13 spent a lot of time considering that because
14 the new play area that is being designated is
15 adjacent to her property. The applicant did
16 put forth some conditions to try to alleviate
17 noise impacts. We discussed those at the
18 hearing and then we also had post-hearing
19 submissions on that.

20 I think that particular aspect
21 really doesn't go to certainly granting a
22 special exception for the increase in the

1 students and faculty. They are fairly
2 unrelated.

3 The school has been operating
4 there for a while, I think since 2003, so
5 there is really no history showing that there
6 are adverse impacts from the number of
7 students there now or the increase.

8 I think we might leave this noise
9 issue to when we get to discuss conditions
10 perhaps because I think that is a concern and
11 that is something that we would want to
12 consider conditions to address. Not
13 necessarily would we deny this application
14 because of the noise.

15 VICE CHAIRMAN LOUD: Let me say
16 very broadly that I agree with you, Madam
17 Chair, in terms of addressing the noise issue
18 specifically and the conditions. At the same
19 time, in order to even get to conditions we
20 first have to have some sort of sense that the
21 applicant has met the requirements of Section
22 206.2, I believe.

1 I had tremendous concerns with the
2 noise issue. I didn't see any issues with
3 respect to the parking or the traffic
4 management, those kinds of issues, but just
5 looking at the record, looking at the location
6 of the play field, the number of students that
7 would be on the play field at any given time,
8 the hour spread that those young people would
9 be on the play field in the proximity to the
10 home of one of the witnesses that testified,
11 Dr. Welsing, was not a foregone conclusion for
12 me that relief should be granted.

13 I really had to struggle with the
14 issue of whether or not the noise level was
15 such that relief could not be granted under
16 206.2. Notwithstanding, I think I have
17 resolved that issue in a way that would
18 support granting of the application.

19 By the way, I think it was a great
20 application. I think good work is being done.
21 I really do commend the applicant on the
22 outreach to the ANCs and the civic

1 associations. The traffic study was great as
2 well.

3 I just want to say that by way of
4 saying it wasn't a shoe-in for me that the
5 application was entitled to relief. Let's
6 figure out what the conditions are. I really
7 struggle with that idea of a noise level being
8 directly adjacent to the residence and there
9 being some almost lack of preparation by the
10 applicant to deal with that issue at the
11 initial hearing.

12 I think all of us probably spent
13 so much time on traffic management and the
14 study and the results of the study and the
15 different levels of service and all of that.
16 We certainly have had other cases where the
17 noise level, the noise abatement, warranted a
18 lot more testimony and studies and things like
19 that. Just with that caveat, I think I'm
20 ready to move on.

21 CHAIRPERSON MILLER: Okay. I was
22 really -- it's almost really a difference just

1 in approach because 206.2 says the private
2 school shall be located so it is not likely to
3 become objectionable to adjoining and nearby
4 property because of noise, traffic, number of
5 students, or otherwise objectionable
6 conditions.

7 First, I think this school is
8 already located here so I guess I'm looking at
9 206.2 thinking, well, it's already located
10 here. I don't think there is really an issue
11 that it can continue. Then I'm looking at
12 number of students don't seem to be an issue.

13 Noise is an issue and that goes to
14 use of that area. Therefore, I think our
15 conditions will address use of that area, how
16 to address the noise and potential problems.
17 It really doesn't matter. It's just kind of
18 like how do we want to break this down for
19 analysis. I think we all agree that the
20 school can be here and have a number of
21 students and faculty but there have to be
22 certain conditions in order that it not be

1 objectional.

2 VICE CHAIRMAN LOUD: I think we
3 are going to end up in the same place for most
4 of the same reasons. The school is there but
5 the location of the play facility is going to
6 change and that is going to be a substantial
7 difference in status quo for all the parties.
8 I think 206.2 does have some usefulness to
9 that issue alone.

10 CHAIRPERSON MILLER: It does. It
11 absolutely does. I'm just reading it as they
12 could meet 206.2 provided the following
13 conditions are implemented. I just think as
14 far as getting through this deliberation
15 perhaps we can then just go right to the
16 parking issue which seems noncontroversial and
17 then we could get back and focus on the noise.

18 The parking, 206.3 says, "Ample
19 parking space but not less than that required
20 in Chapter 21 of this title shall be provided
21 to accommodate the students, teachers, and
22 visitors likely to come to the site by

1 automobile.

2 In this particular case they have
3 a parking lot that has accommodated the
4 current number of faculty and staff and
5 visitors but with the increase in faculty and
6 staff that triggers a greater number of
7 parking spaces that are required. They
8 currently have 29 on-site parking spaces.

9 Increasing the staff to 56 would
10 increase required parking to 37 and they
11 represented and provided evidence that they
12 can provide 23 conforming spaces but would
13 need to provide the remaining 14 in tandem.

14 We just need to go through. This
15 is a variance and they explain their
16 exceptional condition is there are already
17 existing improvements on the property. The
18 building is already where it is and they
19 already have a lot and they can't really
20 increase it in size because of the grading.

21 We also explored with Office of
22 Planning could they flip it and put the

1 parking over where the play area is supposed
2 to be. If I recall, the testimony of Office
3 of Planning, that would be very expensive and
4 not a realistic option.

5 It sounded like maybe that would
6 solve the noise issue as well but the evidence
7 was that really is not an option. Then I see
8 that the practical difficulty is that they
9 cannot provide more parking that is
10 successful, as we just said. They can't do
11 this flip because it is prohibitively
12 expensive and they can't increase because of
13 the grading.

14 Then another practical difficulty
15 they would have if they can't increase their
16 parking then they can't fulfill their mission
17 and they are the only Jewish day school in the
18 city.

19 There were no adverse impacts
20 identified from the stacking or from the
21 parking in tandem. It's for faculty and staff
22 who don't need to leave during the day for the

1 most part. It's all within the control of the
2 school and no adverse impacts were identified
3 by anyone. I think they meet the variance
4 test on that. Does anyone have any further
5 comments? Then we can probably get into the
6 noise question.

7 Mr. Dettman, did you have any
8 problem with it?

9 MEMBER DETTMAN: Just that I think
10 fulfillment of the first prong of the variance
11 test goes not exactly to the shape of the
12 property but, like you said, Madam Chair, to
13 the existing improvements on the property. I
14 believe the existing building was built around
15 1949/1950 and it was built to a size that we
16 are told at one time accommodated 350 students
17 and actually maybe even 450 students.

18 I'm looking at a letter from
19 Stanley Siegel that's in the record from the
20 Hebrew Academy. Now the applicant is seeking
21 an increase in the number of students from 225
22 to 275 which is well below what appears to be

1 the carrying capacity for the number of
2 students of this building. The building was
3 also built prior to adoption of the zoning
4 regs and prior to the parking requirement in
5 Chapter 21.

6 I agree that it goes to the
7 improvements of the property and that this
8 increase of only 50 students is still well
9 below the current capacity of this building.
10 I don't foresee having an adverse impact on
11 the neighborhood with tandem parking.

12 CHAIRPERSON MILLER: Okay. I
13 think we can go to the question of noise in
14 this case which is raised because even though
15 the school has been there a long time a
16 private residence is being razed next door and
17 an outdoor play area is going to take place
18 adjacent to Dr. Welsing's property.

19 She was not a party to the case
20 but we heard testimony from her and also have
21 received that letter that just came in today
22 in which I believe she requested that there be

1 a brick wall in between the properties.

2 What I'm going to do is approach
3 this as starting with what conditions we would
4 want to put on this application in accordance
5 with 206 to prevent objectionable conditions
6 in general. Applicant did also submit
7 proposed conditions.

8 The first two go to the number of
9 students and faculty and staff. That has
10 become common in our special exception orders
11 for schools so that this is set and we
12 understand the impacts from this number of
13 students and faculty with respect to noise,
14 with respect to traffic.

15 Parking, we have a fixed number
16 and the applicant has given us a number that
17 they are comfortable with and we haven't heard
18 any adverse impacts related to the numbers.

19 The other thing I would say is the
20 point of our conditions in addition to
21 complying with 206 in general go to mitigate
22 any anticipated adverse impacts. Our goal is

1 to make them clear and enforceable so that it
2 is easy for the applicant and the community to
3 understand them and live with them.

4 Okay. My first one would be that
5 enrollment shall not exceed 275. My second
6 would be faculty and staff combined shall not
7 exceed 56. Those are fairly basic. Those are
8 the numbers they gave us and I think we can
9 move on.

10 Then I think we get into -- okay,
11 we did hear evidence somewhat about noise. I
12 think a lot of what we heard was somewhat
13 general on both sides. We, for instance,
14 imagined that from our own life experiences
15 and from what Dr. Welsing said that, you know,
16 children can make a lot of noise playing
17 outside. I think that is probably a given.

18 What wasn't a given to me is how
19 noisy is this in the context of 16th Street.
20 What difference does it make if there are 30
21 children playing versus 60 children playing.
22 We heard testimony from the same kind of life

1 experience.

2 I think it was Dr. Welsing that
3 said one dog barking can be very annoying. We
4 have to kind of set parameters that make sense
5 and I don't think that we have a lot of
6 scientific evidence to go on.

7 We basically have Office of
8 Planning recommendation that it was not
9 unreasonable to have certain number of
10 children playing outside next to the property.
11 I don't know if Office of Planning came up
12 with a number or not. I'll have to look at
13 that.

14 We don't have any noise studies
15 per se. I think that we have to just basically
16 go on the evidence that was in the record and
17 then our own judgment.

18 Do you have the applicant's
19 proposed conditions in front of you? I looked
20 at them and then used them as my starting
21 point. I think the next condition would go to
22 whether we should limit the number of students

1 playing at one time in that area. They
2 recommended 65. I believe they said at one
3 point they wanted to have 90 and they dropped
4 it to 65.

5 The condition would read that, "No
6 more than 65 students shall be permitted at
7 one time in the play area adjacent to the
8 residential property on the southern property.
9 That's the play area that has been identified.

10 I think it is up to us to try to
11 assess whether that is reasonable for the
12 school to have that number of students playing
13 outside in that area. Would it make a
14 difference? Would we know that it would make
15 a difference if we were to lower that number
16 ourselves? What would our basis be?

17 The other factor here, and this
18 one was somewhat hard to factor in, was that
19 the neighbor has said that she is not there
20 during the day right now but she anticipates
21 that at some time in the future she may retire
22 and be there.

1 For me at this point I don't see a
2 specific reason to lower that number based on
3 the fact that I believe that the Office of
4 Planning is on board with that and I don't
5 have evidence that a lower number would make
6 a difference. What do you think?

7 VICE CHAIRMAN LOUD: I guess my
8 only thought, and I don't know if I want to
9 impose this as a condition, is that they will
10 gradually go from I think it's 212 now. I'm
11 not certain -- 225 now to 275 and this seems
12 to be the maximum that once you reach the 275
13 this would be the number that would be out on
14 the playground at any given point in time.

15 To have sort of a graduated scale
16 so that while, for example, they are still at
17 225 they would not necessarily need to have 65
18 out on the playground at one point -- at a
19 given point in time but it would correlate to
20 the student population that they have at that
21 point in time.

22 Making that a condition, how you

1 word that, but you see the idea I'm leading
2 to. If at some point they are going to have
3 275 they are going to need to have at least 65
4 of them out at a given point in time in order
5 for all of the population to recreate.

6 If they are not at 275 yet, we are
7 giving them the maximum cap right now and I
8 guess I'm raising the question of whether we
9 should correlate it to the actual population
10 and not the projected cap.

11 CHAIRPERSON MILLER: I don't
12 recall that it was correlated for our analysis
13 with the number of students that they expected
14 to have like dividing it in quarters or
15 whatever. I wouldn't want to get too
16 complicated.

17 VICE CHAIRMAN LOUD: I understand.

18 CHAIRPERSON MILLER: My other
19 concern is I wouldn't want to put people in
20 the position that they are going to go count
21 the number of students that are playing out
22 there either. I don't think that will happen.

1 This is a substantial number.

2 VICE CHAIRMAN LOUD: I think as we
3 proceed through your analysis there may be
4 another way for that issue to be addressed.

5 CHAIRPERSON MILLER: Okay. If we
6 leave that for now. I mean, it is a number
7 that they say they can live with. I think
8 part of my other concern is sometimes a school
9 can limit themselves too much and there may
10 not really be a good reason for it. For
11 instance, if they limit it to 40 and really
12 you couldn't tell the difference between 40
13 and 65.

14 They could really infringe upon
15 the recreation of their students. I think we
16 would need to determine that this would cause
17 an adverse impact. I think what you're saying
18 is let's see what other conditions we are
19 going to apply that will also add to
20 decreasing the noise.

21 VICE CHAIRMAN LOUD: I think
22 that's the way I work myself out of the issue.

1 There is a question about whether the hours
2 would be 10:00 a.m. to 4:30 which is
3 represented on page 15 of the proposed
4 findings.

5 There is another page that
6 represents the hours as 10:00 a.m. to 2:30.
7 I think that is a huge difference in terms of
8 my supporting the language of that condition.

9 CHAIRPERSON MILLER: I think the
10 question would be, you know, why because I
11 understand it would be two more hours of peace
12 and quiet might be one reason but I think that
13 10:00 to 4:30 is a time as of now I believe
14 when the neighbor is not at home, working
15 hours, and wouldn't be infringing on the
16 neighbor.

17 VICE CHAIRMAN LOUD: My threshold
18 question is just whether they intended 2:30 or
19 4:30 because there are two different numbers
20 represented in different places of the
21 pleadings. 4:30, okay.

22 CHAIRPERSON MILLER: I'm sorry.

1 We don't take any comments from the public in
2 our meetings, I'm sorry, unless we
3 specifically ask. I think if we limit the
4 hours further, we need to have a good reason
5 to do that, a good correlation between the
6 greater condition and the result that we are
7 trying to achieve which would be less noise
8 obviously.

9 VICE CHAIRMAN LOUD: I think from
10 10:00 a.m. to 2:30 is pretty much half the
11 day. From 10:00 a.m. to 4:30 is the full day
12 and we are talking about five days a week.
13 There is some testimony from Dr. Welsing
14 regarding her age and her proximity to
15 retirement and spending more time at her home.

16 I'm looking at it from the
17 standpoint of everybody trying to compromise
18 a little bit and objectionable conditions of
19 noise and, "Okay, you may need to learn to
20 live with something that is going to be there
21 four hours a day for five days a week."

22 Whether or not that tips the

1 balance when it is six-and-a-half or seven
2 hours every day at your home and I think it
3 does tip the balance. I think you are
4 effectively being deprived of that solitude
5 that we all sort of come to expect to have in
6 our homes for pretty much the entire day from
7 10:00 a.m. to 4:30, again, as opposed to 10:00
8 a.m. to 2:30.

9 I think with all of these cases
10 they are subject to a lot of interpretation.
11 We look at the regs and we try to do our best
12 and bring our experiences and fairness and
13 everything else into it. We also look for
14 some balance here in trying to balance and
15 weigh the different interest involved and
16 reconcile those interest.

17 I was pleased to see 10:00 a.m. to
18 2:30 in the pleadings. When I saw it I
19 thought that is what was being proposed. I
20 hope there is enough room for that to be
21 something -- maybe it was a Freudian slip --
22 for that to be something that this Board

1 agrees to as a condition.

2 MEMBER DETTMAN: Just a couple of
3 things. With respect to the proposed number
4 of students using this space at any given
5 time, the proposed condition No. 2 says 65.
6 I am comfortable with that number of students.

7 Once they reach the 275 student
8 threshold it is approximately a quarter of the
9 students using that space. Not looking at it
10 too detailed but 65 students seems to be a
11 comfortable number of little ones using that
12 space given the amount of space that is there.

13 I think the proposed times is
14 really what interest me. One thing we didn't
15 find out in the hearing is whether or not
16 students are outside multiple times per day or
17 if it's just one time a day for recreation
18 time. It mentions Item No. 13 on page 8 of
19 Exhibit 41 that it will be available to the
20 children for 30-minute intervals.

21 If you make the assumption that
22 each child will be outside once a day, it's

1 really only two hours a day that this space is
2 going to be used, that noise is going to be
3 generated two hours a day. Going to the
4 proposed hours that the play area will be
5 available, it states 10:00 a.m. to 4:30 but
6 perhaps a solution could be that there could
7 be two time intervals.

8 There could be a morning
9 recreation session, there could be an
10 afternoon recreation session. I don't know
11 what those intervals would be but basically
12 what that would allow is it would sort of free
13 up some time during the middle of the
14 afternoon to provide the neighbors some quiet
15 time to enjoy the day.

16 I guess I would just sort of offer
17 that option up as a potential condition with
18 respect to the proposed hours during the day
19 that the play area would be available.

20 CHAIRPERSON MILLER: What is your
21 specific recommendation?

22 MEMBER DETTMAN: Instead of having

1 a broad time range stated in Exhibit 41, 10:00
2 a.m. to 4:30, could we potentially break up
3 that day into two different recreation times,
4 one that could be used by the school during
5 the morning.

6 Maybe there is a two or two-and-
7 half-hour playtime in the morning and a two-
8 and-half-hour play time in the afternoon.
9 Then it would be up to the school to sort of
10 divvy up, I guess, the students that would get
11 recreation time in the morning and then the
12 rest in the afternoon. I'm just potentially
13 looking for a solution.

14 Instead of having a wide range of
15 hours that noise could be generated all day
16 long, we break it up into a morning and an
17 afternoon time. Outside of those times there
18 is quiet time for the rest of the
19 neighborhood.

20 VICE CHAIRMAN LOUD: Would you be
21 proposing the specific time periods or how
22 would we address that issue? I can see, for

1 example, 10:00 to 12:00 noon, say 1:00 to 3:30
2 or something like that. Is that along the
3 lines of what you were conceptualizing?

4 MEMBER DETTMAN: Yeah, I think
5 that's the idea. It would be up to us to
6 determine what hours.

7 CHAIRPERSON MILLER: I don't think
8 it would be up to us to determine what hours.
9 I think we need to be careful about crossing
10 into the program of the school. If your point
11 is a two-hour block in the morning and a two-
12 hour block in the afternoon or something like
13 that, that might be one thing.

14 I would really caution by Board
15 members about programming 10:00 to 11:00
16 recreation, you know. I'm not under the
17 impression that they are going to have
18 students outside continuously from 10:00 to
19 4:30 but that means that those are the hours
20 when they could be outside. That's the range
21 of time.

22 This is very difficult. I really

1 do think it is very hard to anticipate or to
2 understand how noisy is it going to be. I
3 think we also have to -- in doing these
4 conditions we have to weigh the context that
5 the school has been here. There has always
6 been a school here. Whoever lives near the
7 school knows that there is a school there.

8 It is new that they are using this
9 area to play but it is not a surprise that
10 someone is living near a school. Also the
11 fact that this is on 16th Street. It's not on
12 a quiet residential street where you do expect
13 more peace and quiet than you would in this
14 location.

15 VICE CHAIRMAN LOUD: I understand.
16 It is sort of difficult for me to keep going
17 around and around on this because I think both
18 the applicant and the witness, Dr. Welsing,
19 have compelling cases to push forward --
20 positions to push forward. Again, I am
21 looking at 206.2.

22 I'm looking at the element of

1 objectional levels of noise and I'm just
2 wondering if there is a way to make it a
3 little more reflective of where 206.2 wants to
4 take us by at least giving some predictability
5 to the adjoining property owner as to when the
6 noise and the excitement and the energy of
7 children.

8 We all love them. I have two
9 nine-year-old twins so I know -- and they play
10 soccer -- I know how much noise 20 kids
11 playing soccer can make let alone 65 or
12 whatever that number may be.

13 It seems to me if there was some
14 predictability to the day for the adjoining
15 property owner where that property owner knew
16 that this level of noise is only going to be
17 happening between the hours of 10:00 and, you
18 know, pick a number, 10:00 and 3:00.

19 For me I'm saying that between
20 10:00 and 4:30 it pushes me right up to 206.2.
21 But if it were a lesser number and the
22 adjoining property owner could then plan the

1 day around that and know with some degree of
2 certainty what those hours are going to be, a
3 window of 10:00 a.m. to 4:30 every single day,
4 and never knowing what time periods during
5 that day they will be out playing, it's
6 just --

7 CHAIRPERSON MILLER: You made a
8 good point.

9 VICE CHAIRMAN LOUD: -- takes me
10 right up to 206.2.

11 CHAIRPERSON MILLER: I'm wondering
12 -- well, I'm not putting my hands on it right
13 now but I believe that -- I thought that they
14 did submit a schedule of their day or
15 something if I am not mistaken. I'm looking
16 for it. In any event, I think predictability
17 is certainly something that can be addressed.

18 They could have -- first of all,
19 if they didn't give us a schedule, they
20 certainly can have a schedule that they
21 provide to the ANC and the community and the
22 neighbors so that they know exactly when that

1 field may be used perhaps and other things.

2 I don't have a problem with that, with
3 predictability.

4 I also want to raise the point
5 that no party and Dr. Welsing didn't address
6 this -- I don't believe. Tell me if I am
7 mistaken -- question of hours. Even in the
8 letter that Dr. Welsing submitted last minute
9 to us doesn't raise any issues with these
10 hours.

11 VICE CHAIRMAN LOUD: I think the
12 over -- you're right. I think the letter goes
13 well beyond just the issue of what hours
14 during which there would be some noise and
15 really tries to come up with an alternative.

16 Apparently the parties were
17 negotiating that they were not able to agree
18 upon that would have abated the noise to the
19 satisfaction of Dr. Welsing regardless of the
20 hours that they were going to play.

21 There was no meeting of the minds
22 on that particular issue. I think what I am

1 trying to do is step in and somewhat fill the
2 gap and bring the parties a little bit closer
3 in a way that doesn't leave me so
4 uncomfortable with 206.2.

5 You are right that specifically it
6 was not raised as a concern but I think that
7 is because the approach taken during the
8 negotiations may have been somewhat zero sum.
9 I don't know if that is a mischaracterization
10 of it but certainly went a lot broader than
11 the gap filling that I am trying to -- the
12 spirit of the gap filling that I am trying to
13 do right now.

14 CHAIRPERSON MILLER: How about if
15 we did add a condition that the school would
16 publish a schedule of when the play area will
17 be used during the day. Seems to me that is
18 part of their program that they should be able
19 to predict so that a resident might be able to
20 plan their day around that schedule if that
21 was a factor.

22 VICE CHAIRMAN LOUD: Well, there

1 still hasn't really been a response from my
2 colleagues on the notion of reducing the hours
3 from 10:00 -- reducing the spread that is now
4 10:00 a.m. to 4:30 p.m. to a more narrow band
5 of time, say 10:00 a.m. to -- I propose 10:00
6 a.m. to 2:00.

7 CHAIRPERSON MILLER: Okay.

8 This --

9 VICE CHAIRMAN LOUD: Go ahead.

10 CHAIRPERSON MILLER: My response
11 is I hesitate to do that without knowing the
12 ramifications and without a party or even the
13 neighbor asking us to do that because it may
14 mean if they are not allowed to use the field
15 after 2:00, then it may mean that they are
16 more crowded inside or they won't be able to
17 offer certain recreation or whatever.

18 We don't know. I don't feel like
19 we have a good enough reason to do that even
20 though it is in good faith that we are trying
21 to limit noise in general.

22 VICE CHAIRMAN LOUD: I agree with

1 you, Madam Chair, that the record is scant.
2 It's just real scant with respect to the whole
3 noise issue and the impact of where that
4 leaves us. At the same time, there was
5 tremendous testimony from Dr. Welsing
6 regarding the impact of noise.

7 I think we can all make inferences
8 about the number of young people that will be
9 playing. There won't be any equipment. The
10 testimony was that there would be a lot of
11 soccer played. It's a fun game. You know,
12 it's noise and kids running around and it's a
13 lot of other things all rolled into one and it
14 should be.

15 I understand your point about us
16 not programming that because we really aren't
17 equipped to do that and don't know what the
18 limitations are that the school faces. In
19 light of that, I would be willing to support
20 a condition that would at least put some
21 predictability to when the young people would
22 be playing and that would make it very clear

1 that they will not be recreating on that space
2 continuously from 10:00 a.m. to 4:30 p.m.
3 every day.

4 If that is what the proposal is, I
5 would really have to be against that. It
6 doesn't sound like that is what it is. It
7 just sounds like selecting the time bands
8 between 10:00 a.m. to 4:30 that fit the
9 programming needs of the school and the
10 leadership of the school and the
11 administrators.

12 I would be willing to support
13 that. I guess the way it's written we would
14 have to sort of tweak the language a little
15 bit. You are more than welcome to loss some
16 stuff out.

17 CHAIRPERSON MILLER: We can tweak
18 it but let me see if I can just capture it in
19 general. Would it be something like that the
20 school shall provide or publish a schedule to
21 the ANC and the community and the neighbors of
22 the use of the playing area and shall schedule

1 breaks between playing times.

2 VICE CHAIRMAN LOUD: And to be
3 really clear, I would say, however, this
4 condition shall not be interpreted so as to
5 allow contiguous play periods between 10:00
6 a.m. -- consecutive contiguous play periods
7 between 10:00 a.m. to 4:30 p.m. without
8 interruptions, without breaks.

9 CHAIRPERSON MILLER: What I'm
10 trying to do is try to fashion a specific
11 condition, not how it can be interpreted.
12 Let's try to build it in. For instance, first
13 of all, they will publish it so we know that
14 it's going to be predictable.

15 VICE CHAIRMAN LOUD: That's good.

16 CHAIRPERSON MILLER: Second of
17 all, there will be breaks of at least 10
18 minutes between. We can say there has to be
19 some intervals between playing periods or we
20 can be a little more specific if we want to.

21 VICE CHAIRMAN LOUD: That is where
22 the record will really have helped us if we

1 know a little bit more about the recreational
2 program that they have in mind. My idea is
3 that there would not be -- there wouldn't be
4 beginning at 10:00 and running straight
5 through to 4:30 every single day groups of
6 young people that are playing on the field.

7 Shane's interpretation of the
8 numbers involved is such that you would
9 probably have four periods, 65 kids, four
10 periods. It doesn't seem like that is
11 reality. I guess the best I can do is there
12 should be in this six-and-a-half-hour block at
13 least two hours and the applicant can select
14 those two hours where young people are not on
15 the field playing.

16 MEMBER DETTMAN: I'm certainly in
17 favor of the school publishing a schedule and
18 providing it for the ANC and surrounding
19 neighbors spelling out when the recreation
20 area will be in use.

21 Again, that sort of raises my
22 concern that it's going to be a half an hour

1 of play time, 10 minutes of down time, half an
2 hour of play time between the hours of 10:00
3 and 4:30. For the surrounding neighbors that
4 provides 10 minutes of solitude every half
5 hour. That is a level of predictability but
6 I don't know if that is feasible.

7 I would be in favor of a condition
8 not spelling out the exact window of time in
9 the morning and the afternoon that they have
10 to use it but just say that the play area
11 would be available for recreation for a two-
12 and-a-half-hour time period in the morning and
13 a two-and-a-half-hour time period in the
14 afternoon.

15 That allows a level of flexibility
16 for the school to decide and schedule their
17 classroom time around a two-and-a-half-hour
18 window in the morning and in the afternoon.

19 What that also does is a allows
20 the school to -- because we don't specifically
21 state what times in the morning and afternoon
22 it will be used, six months down the road if

1 their class schedules change, it allows them
2 to shift the two-and-a-half-hour schedule in
3 the morning and afternoon and republish a
4 schedule to the ANC.

5 I would be in favor of that
6 solution with respect to the programming of
7 the space. Of course, we still need to
8 discuss the design of the space and the
9 vegetative buffer and other noise abatement
10 solutions with respect to design.

11 VICE CHAIRMAN LOUD: I can support
12 what Mr. Dettman just sort of laid out as the
13 parameters for the condition. It seems to get
14 us closer to where I think we ought to go in
15 terms of the whole noise issue.

16 CHAIRPERSON MILLER: Okay. I
17 think I can go along with that. Basically it
18 gives some flexibility to program their time
19 but it leaves some quiet time on that area.

20 VICE CHAIRMAN LOUD: I think
21 specifically mention two-and-a-half-hour block
22 in the morning and a two-and-a-half-hour block

1 in the afternoon.

2 CHAIRPERSON MILLER: Okay. I
3 don't know. Usually in the past we often do
4 have the parties address the conditions so
5 that we have the input of the parties when we
6 are deliberating. In this case the conditions
7 came in after the hearing with proposed
8 findings and conclusions of law.

9 If we are going to open this up,
10 which we have the authority to do, I know that
11 Dr. Welsing also wanted to say something so
12 let me just confer with my Board members and
13 get back to you all in a minute.

14 Okay, you can come forward. We
15 realize as we are deliberating these
16 conditions that they do have ramifications on
17 the school and ideally we are happy to hear
18 from you. There isn't any other party in the
19 case except the ANC. I don't know if the ANC
20 is here but they didn't oppose you so we have
21 decided to open this up and let you address
22 whatever might concern you or an opinion about

1 a condition that might concern you.

2 MR. GREENFELD: Thank you, Madam
3 Chair. I've been listening. I hear what
4 you're saying and I think I might be able to
5 make it easier. I appreciate what you said
6 about not wanting to program. Perhaps it was
7 our error in not giving you enough in the
8 record about our program.

9 10:00 to 2:30 is the time during
10 the school day we would be using that play
11 area for children. They are half-hour
12 intervals during that day and they are pretty
13 much contiguous. One class goes in and
14 another comes out. Not every group of
15 children will be 65.

16 That is our maximum number but
17 some could be much less. Some could be 50 and
18 some could be 22. It depends on the size of
19 the classes and the way they are scheduled.
20 From 2:30 to 3:30 we would not plan on having
21 anyone there and from 3:30 to 4:30 is the time
22 we would allow the after-school program to use

1 the outdoors. That is a much smaller number.

2 Currently we have about 30 kids
3 enrolled in that after-school program and I
4 wouldn't anticipate it going up too much.
5 Again, in proportion to our enrollment maybe
6 it would go up to 40 or 45. I appreciate your
7 concern trying to make afternoon and morning
8 blocks but that wouldn't work with our program
9 since the kids are gone at 3:30 and outdoor
10 recess is over by 2:30.

11 Having that freedom as you might
12 suggest wouldn't help us because we would have
13 two hours there with no kids. I don't know if
14 that helps in any way. You make your decision
15 but, again, I apologize. Perhaps our record
16 should have been clearer.

17 CHAIRPERSON MILLER: Thank you.
18 That's helpful. Let me just ask you one other
19 question since you're here.

20 MR. GREENFELD: Sure.

21 CHAIRPERSON MILLER: What would be
22 the ramifications if the Board were to limit

1 the time period between 10:00 to 2:30 or
2 create --

3 MR. GREENFELD: The ramifications
4 would be that the after-school program would
5 be limited to the area where the equipment is
6 on the other side of the building.

7 CHAIRPERSON MILLER: No, I don't
8 think you understand my question.

9 MR. GREENFELD: Oh, I'm sorry.

10 CHAIRPERSON MILLER: That's okay.
11 You said your program, JPDS, uses the field
12 from 10:00 to 2:30.

13 MR. GREENFELD: Correct.

14 CHAIRPERSON MILLER: That's what
15 you would like to do.

16 MR. GREENFELD: Correct.

17 CHAIRPERSON MILLER: If this Board
18 were to say there has to be 15-minute
19 intervals between each half-hour or whatever
20 or you couldn't use it for one hour, you know,
21 what would the ramification be?

22 MR. GREENFELD: It would be very

1 difficult to adjust the schedule. As it is
2 now the program really would not accommodate
3 breaks in the schedule because everything is
4 so tight, especially because it's a dual
5 curriculum. Classes are in Hebrew Judaics.
6 While one half of a class may be in Hebrew
7 Judaics the other is in general studies.

8 It is really a very elegant ballet
9 that our administrators have choreographed and
10 I think throwing a wrench of 10-minute breaks
11 between half-hour intervals could throw things
12 off such that children wouldn't be getting the
13 same outdoor recess they are getting now.

14 CHAIRPERSON MILLER: Okay. Thank
15 you.

16 MR. GREENFELD: Thank you very
17 much.

18 CHAIRPERSON MILLER: I think what
19 we have heard is the school has been in
20 existence and it has this program that was
21 just described with outdoor play but it wasn't
22 in the property being expanded to now. Based

1 on what I heard I wouldn't be inclined to
2 disrupt their schedule because I'm not certain
3 that the decrease in noise would be sufficient
4 to disrupt their program.

5 VICE CHAIRMAN LOUD: Madam Chair,
6 and everyone, thank you for your indulgence.
7 I know we want to move forward. I think based
8 on what I just heard it is supportable. There
9 are clear breaks in the afternoon, both the
10 2:30 to 3:30 break all together.

11 Even the 3:30 to 4:30 is chopped
12 in half. It goes from about 65 potentially to
13 30. That wasn't made clear initially. I
14 think that is a break that makes sense to me
15 and is something that I could support.

16 CHAIRPERSON MILLER: Okay. I
17 think what we would do probably --

18 Dr. Welsing, I see you want to say
19 something. I'm going to make an exception
20 because in all fairness to you that you are
21 the neighbor. In our rules you're not a party
22 so you don't have quite the same standing but

1 if you want to make a very brief statement,
2 we'll hear it.

3 Identify yourself for the record
4 also.

5 MS. WELSING: Dr. Frances Welsing.
6 I wanted to say that I am in my office three
7 days a week, Monday, Tuesday, and Wednesday
8 only so Thursday, Friday, Saturday, and Sunday
9 I am in my home basically all day so I wanted
10 to make that correction.

11 Also to state that there probably
12 would be much less difficulty if there was
13 additional barrier, sound barrier, a wall that
14 was there. They could have any kind of
15 schedule that they wanted if there was a wall
16 that was a protection. Thank you.

17 CHAIRPERSON MILLER: Thank you.
18 Just with respect to the hours, then I would
19 suggest that we perhaps incorporate the
20 schedule in the order to be used by the school
21 10:00 to 2:30, not to be used between 2:30 and
22 3:30 and after school 3:30 to 4:30.

1 If we do that, then there is
2 probably no need to have it published since
3 it's right in this order. Schools often do a
4 service to themselves as well when they
5 communicate with their neighbors so they may
6 do that any way.

7 MEMBER DETTMAN: Madam Chair.

8 CHAIRPERSON MILLER: Yes.

9 MEMBER DETTMAN: There was a brief
10 comment during the hearing that I think during
11 the summer months every other -- something
12 about every other Sunday a third-party
13 organization uses the facility. I'm just
14 wondering if we should address the use of the
15 play area on the weekends. So far we have
16 been talking Monday through Friday.

17 CHAIRPERSON MILLER: Okay. I
18 think that raises the point that I think
19 perhaps we should add a condition that they
20 publish the schedule. This may not cover it
21 because what you're saying is then it may also
22 be used. At least their program schedule.

1 What is your recollection about weekends and
2 after school? Is that what you're saying?

3 MEMBER DETTMAN: That's right.
4 Looking at my notes from the hearing I have
5 that a third party does utilize the school
6 every other Sunday less than 100 kids inside
7 the building only. They will not use the
8 outdoor play area. Okay. It also says a
9 summer camp is also conducted at the school.

10 I'm not suggesting that the same
11 time constraints for Monday through Friday are
12 applied to the weekends because the weekends
13 are a down time. It should allow a little bit
14 more flexibility. I just wanted to raise it
15 to the Board's attention for consideration.

16 CHAIRPERSON MILLER: Well, I
17 think, first of all, any programmed use of the
18 field should be in the schedule, a published
19 schedule. That would include weekends and
20 summer. With respect to regulating it, did
21 you say Sunday morning that they let out their
22 facility?

1 MEMBER DETTMAN: Every other
2 Sunday. The applicant did mention that they
3 used the inside of the building only so this
4 may not be an issue.

5 CHAIRPERSON MILLER: Okay. Since
6 they have a history and they haven't been
7 using it, I don't think we need to have a
8 condition to mitigate adverse impact. For
9 summer did you think there was an issue?

10 MEMBER DETTMAN: Again, just
11 bringing up points from the hearing for the
12 Board's attention, they had mentioned that a
13 summer camp is also conducted at the school.
14 It didn't mention inside or outside.

15 I assume there are some outside
16 activities. As you say, Madam Chair, given
17 the applicant's demonstrated commitment to
18 being good neighbors, I don't know if summer
19 camp would be that much of an issue.

20 CHAIRPERSON MILLER: As I think we
21 heard from the neighbor also, I don't think
22 scheduling is per se an issue. Okay. If we

1 could move on from that.

2 Okay. The applicant's next
3 condition goes to implementing a landscape
4 plan. They had said that, "The school shall
5 implement the landscape plan, specifically the
6 buffering provided for, and therein submitted
7 as Exhibit ____ of the record."

8 I have a rewording of this. I
9 don't know if anybody else does. I'll throw
10 out mine just because I wanted to get some of
11 what is graphically shown on the landscape
12 plan into words for anyone who might be
13 reading the order.

14 The way I have worded it so far
15 is, "The play area shall be set back 15 feet
16 from the south property line and landscaped in
17 accordance with the attached landscaping plan
18 that includes an open lawn, a 10-foot grade
19 change between the play area and the adjacent
20 property, and a buffer of evergreen trees
21 between the play area and the adjacent
22 property."

1 That is just general. We can
2 tweak it. Do you have other suggestions as to
3 -- what we want to convey is the applicant has
4 proposed a landscaping plan that has this
5 grade change and that has this buffering of
6 evergreen to address the noise issue and we
7 want to make sure that is implemented.

8 MEMBER DETTMAN: I think it's a
9 little prescriptive from a design standpoint
10 but it seems that the landscape plan has been
11 negotiated to a certain extent with the
12 neighboring property. The applicant seems to
13 be fine with creating this grade change and
14 supplementing the evergreen vegetative buffer
15 along the south property line. I would be
16 fine with that wording.

17 CHAIRPERSON MILLER: Then you want
18 to just include theirs that it is implemented
19 in accordance with their landscaping plan?
20 Okay. I mean, I think mine is a little wordy
21 and I think we can tweak these later. My only
22 concern is sometimes you can look up an order

1 online but you can't look up an exhibit so
2 someone might not know, that's all. Do you
3 have any comments?

4 VICE CHAIRMAN LOUD: No.

5 CHAIRPERSON MILLER: Okay. I
6 think especially for time sake we can say we
7 are in agreement that they have to implement
8 this landscaping plan and it does do the
9 things that I described but I don't believe we
10 have to right this minute like wordsmith it to
11 death.

12 I think we are in agreement that
13 they will do that and we can tweak the words
14 on this. I don't think this is a
15 controversial condition. It's just
16 implementing the landscaping plan.

17 The applicant didn't propose this
18 but they represented it in their papers that
19 there would be no permanent play equipment on
20 the play area. I think that would be a
21 reasonable condition to put in.

22 Next is there transportation

1 demand management program. Mr. Dettman, did
2 you have specific language on this? Otherwise
3 I have some.

4 MEMBER DETTMAN: I don't have any
5 specific language concerning traffic
6 management.

7 CHAIRPERSON MILLER: Okay. All
8 right. This was my language which is a little
9 different from theirs just because their's
10 doesn't show what the level was at the time
11 the application was filed so I thought it was
12 kind of hard for anybody in the community to
13 know whether or not they were meeting it.

14 I wrote something like this. "The
15 school shall implement and maintain a
16 transportation demand management program that
17 maintains a trip generation level 10 percent
18 lower than what existed at the time of the
19 filing of this application. Applicant shall
20 identify clearly these figures on a yearly
21 basis and its transportation demand management
22 program which shall be available to the ANC

1 and the community upon request."

2 I did that so it could be
3 enforceable in some way and measurable. I
4 don't have any other conditions right now but
5 I believe there is the issue about should
6 there be more buffer between the properties
7 than the evergreens such as a wall as opposed
8 by Dr. Welsing.

9 VICE CHAIRMAN LOUD: I'll speak to
10 it very, very briefly. I hope very briefly.
11 I don't want to propose this as a condition
12 but give sort of the history of the case and
13 how the parties have worked in good faith
14 leading up to this point having negotiations
15 as recently as January 11 and serving the full
16 support of the ANC.

17 There is something that I think
18 Mr. Dettman noted earlier when we talked. Not
19 on record but in our meeting about the
20 applicant proposing to work in good faith to
21 provide some sound-absorbing materials on the
22 existing wood fence that on the south lot of

1 the property.

2 I would just encourage continued
3 dialogue on that in good faith at the
4 applicant's expense both the installation and
5 the maintenance of that site in a way that
6 site in a way that allows the gaps to be
7 filled that may or may not have been filled by
8 this hearing. I think that is an excellent
9 proposal and I would just hope the parties
10 move forward in continuing that dialogue.
11 Thank you, Madam Chair.

12 CHAIRPERSON MILLER: Thank you. I
13 would also like to pick up on that because the
14 applicant represented in its post-hearing
15 submission Exhibit No. 40 in our record at
16 page 3 that it would be "happy to work with
17 Dr. Welsing in looking into options for
18 providing sound-absorbing materials on the
19 existing fence.

20 Provided a reasonable agreement
21 can be negotiated, JPDS will pay for the
22 expenses associated with purchasing and

1 incorporating those materials." Based on
2 that, I would second your point. I find it
3 difficult to frame a condition for this
4 because it's not exactly clear that it is
5 required or what it would do but I think it's
6 a good idea.

7 I don't think we can condition it.
8 I think it is a good idea that they should
9 continue working on that particularly once
10 this goes into action and the children are
11 playing and then they can assess what the
12 noise level actually is.

13 Any other comments? Okay. Then I
14 would move approval of Application No. 17700
15 of Jewish Primary Day School of the Nation's
16 Capital, Inc. pursuant to 11 DCMR 3104.1 and
17 3103.2 for a variance to allow stacked parking
18 spaces under subsection 2117.4 and a special
19 exception to allow an increase in the number
20 of students from 225 to 275 and an increase in
21 the number of faculty from 42 to 56 and the
22 use of a portion of the lot for play area

1 serving an existing private school under
2 Section 206 in the R-1-B and R-5-A districts
3 of premises 1645 16th Street, N.W. Do I have
4 a second?

5 VICE CHAIRMAN LOUD: Second.

6 CHAIRPERSON MILLER: I just want
7 to say that as conditioned the application
8 does meet the requirements of 206. It's in
9 harmony with its neighbors and I believe that
10 the conditions that we have added should
11 address any objectionable conditions with
12 respect to noise and if there were none found
13 with respect to traffic and number of students
14 or other objectionable conditions and that the
15 variance test was met.

16 Further deliberation? Okay. All
17 those in favor say aye.

18 ALL: Aye.

19 CHAIRPERSON MILLER: All those
20 opposed? All those abstaining?

21 Would you call the vote, please.

22 MR. MOY: Yes, Madam Chairman.

1 The staff would record the vote as three to
2 zero to one on the motion of the Chair Ms.
3 Miller to approve the application with
4 conditions as conditioned, seconded by Mr.
5 Loud. Also in support of the motion Mr.
6 Dettman.

7 Madam Chair, we also have an
8 absentee ballot from Mr. Etherly who also
9 participated in the case and his absentee vote
10 is to approve with such conditions as the
11 Board may impose. That would give a final
12 vote of four to zero to one.

13 CHAIRPERSON MILLER: Thank you.
14 The ANC supported this application as to the
15 Office of Planning and there is no party in
16 opposition so this can be a summary order.
17 Okay. Thank you.

18 MR. MOY: The next and last case
19 for decision in the special public meeting is
20 Application No. 17757 of Fifth Street, LLC,
21 pursuant to 11 DCMR 3103.2, for a variance
22 from the floor area ratio requirements under

1 section 402, a variance from the lot occupancy
2 requirements under section 403, and a variance
3 from the open court requirements under section
4 406, to allow an eight (8) unit apartment
5 building in the DD/R-5-B district at premises
6 1130-1132 5th Street, N.W. (Square 482, Lot
7 93; formerly lots 76 and 77).

8 On January 8, 2008, the Board
9 completed public testimony, closed the record,
10 and scheduled its decision at this special
11 public meeting on January 15th. To complete
12 the record the Board request that the
13 applicant submit additional information for
14 the record.

15 The applicant complied and filed
16 on January 11. That is included in your folder
17 identified as Exhibit 38. The Board is to act
18 on the merits of the requested variance. The
19 staff has completed its briefing, Madam Chair.

20 CHAIRPERSON MILLER: Thank you,
21 Mr. Moy.

22 This was the difficult case

1 actually that we were referring to. We had a
2 very emotional hearing last Tuesday, a moving
3 hearing. The Board is sympathetic to what the
4 applicant seems to have experienced that was
5 conveyed to us.

6 However, the Board also has its
7 own duty to apply the variance test which is
8 what is being sought here. In doing so, the
9 Board was saying it is a specific test and it
10 is somewhat flexible with respect to what may
11 be considered an exceptional condition. On
12 the other hand, the Board is applying a
13 specific area of the law and the Board is not
14 totally free to grant variances just based on
15 sympathy of someone's plight.

16 We raised a lot of questions at
17 the hearing and then we went back and
18 considered what was in our files and the law
19 to the extent that we are familiar with it.
20 Basically because we are so concerned about
21 what this applicant has experienced we are
22 actually taking an unusual step that we seldom

1 do and we are going to share to a certain
2 extent where we are in the deliberations.

3 The bottom line is we don't
4 believe that these is enough in our record
5 that the case has been made by the applicant
6 for a variance at this point. However, we are
7 not convinced that the case cannot be made.
8 We understood that there might be some
9 constraints that are on the applicant in
10 presenting this case.

11 The other Board members are going
12 to be addressing various aspects of this. I
13 certainly recall Mr. Turnbull expressing
14 frustration about our being asked to decide an
15 issue without sufficient information being
16 presented.

17 I know that variances are not
18 unusual before this Board. I feel that the
19 applicant did really not go through the
20 specific steps to prove its case. Rather than
21 deny I would like to see if really the
22 evidence is there and if they can present it.

1 For instance, last Tuesday when we
2 heard this case we were struggling to figure
3 out what was the applicant's theory. The
4 Board itself is saying, okay, looks like two
5 different theories, which is fine but make
6 them. One is is there something about the
7 property where you can make a case for
8 variance.

9 Is there something about just the
10 property per se the way the buildings are now,
11 improvements on the land. I know the attorney
12 knows what I'm referring to. Then shows us
13 what that actually is. We were actually
14 trying to guess what it was. When we went
15 back to review our information it still wasn't
16 in there. Same with respect with the zoning
17 history. What is the exceptional condition
18 that led to a practical difficulty in this
19 case.

20 We all agree that there is a
21 practical difficulty that something has
22 already been constructed and that it would be

1 difficult to demolish it and that HPRB finds
2 that the structures are okay and the community
3 has no concerns and there is no adverse impact
4 so what we were asking is what is the
5 exceptional condition because we as a Board
6 need to reach that point.

7 We discussed whether it was zoning
8 history. You can't just say that it is zoning
9 history. You have to tell us what happened in
10 that zoning history that led to this practical
11 difficulty. I have to say that applicant is
12 asking us to make almost a precedent-setting
13 decision that based on this the Board will
14 grant the variance without us even really
15 knowing what zoning history the applicant is
16 referring to.

17 When we have talked about zoning
18 histories in the past, we have a very clear
19 chronology of all the incidents that led to
20 certain actions. We also look to the law.
21 Now, there was hardly any law, if any if I
22 recall, cited by the applicant in this case.

1 If the applicant wants us to reach
2 a decision based on zoning history, then I
3 would like to see how that stands up under
4 case law. The most famous case law that I --
5 well, there is one that I was looking at, the
6 Monaco decision, which talked about good faith
7 reliance on DCRA.

8 I'm not even sure the applicant
9 set that out. There are questions in this
10 case about what might have been done without
11 DCRA approval. There are a lot of issues
12 about what we can look at and what we can't
13 look at. Again, the applicant cannot expect
14 the Board to make a decision with its hands
15 tied behind its back without really knowing
16 the facts and how it is interpreting the law.

17 I think I'm going to pause right
18 now and let others address some of the facts
19 that they saw and some of the questions that
20 they raised because we do sympathize with the
21 applicant but we can't make a decision just
22 based on sympathy. Our decisions have to

1 reach those three prongs and they have to
2 withstand judicial scrutiny.

3 COMMISSIONER TURNBULL: I think as
4 you pointed out quite clearly that the hearing
5 we had last week was quite emotional. There
6 was a lot of touching aspects by the
7 applicant. There was a frustration on my
8 part, I know, quite a bit. I think everyone
9 had it. On reading the testimony the other
10 day it hit back home.

11 I guess there are a couple of
12 issues. I think on the one property being
13 submitted, 1132, I had no real issue with the
14 deck, the sleeping porch, being converted into
15 that.

16 If that had come before us as a
17 separate piece converting a sleeping porch
18 into a permanent year-round structure I didn't
19 have much of an issue with that per se just
20 for that part itself. But you do get into an
21 issue with zoning and the zoning regulations
22 with 1130, the inner property.

1 You're right, although the
2 applicant submitted the plans to us showing
3 the original permit application, some of the
4 drawings, looking at those drawings they are
5 different than the brochure. Originally the
6 applicant had submitted a history, a
7 chronology of events, and they talk about 20
8 permits being issued.

9 I have no idea whether the changes
10 that are reflected on this were ever -- is
11 there a set of drawings that show this other
12 than at some point when the buildings get
13 combined for the condo aspects, those drawings
14 apparently show these changes but is there
15 something prior to that signed off that shows
16 this? I'm not sure. There is a little bit of
17 confusion on that aspect.

18 The other thing is that we get
19 into the permit application and the buildings
20 and we have always seen 1132. 1130 was not
21 submitted as to what that was being applied
22 for. I think if you look at that it will not

1 say that it is an addition. It simply says
2 alteration and repair. That being said, it's
3 hard to piece together from our standpoint
4 what is really being asked for here.

5 The other thing that bothers me
6 right now is that, as I said, I didn't have a
7 problem with the existing sleeping porch being
8 converted. You will see on this document a
9 deck with a circular stairs.

10 My question is is that part of the
11 request also for the variance? If that is
12 still going to be built, that is still adding
13 onto a nonconforming -- if that is at a second
14 exit from the structures, is that a building
15 code required second exit?

16 If that is the case, that
17 increases the nonconformance substantially
18 also. I think you're right. There's a lot of
19 bits and pieces here that the applicant has
20 not addressed for us to clearly explain why a
21 variance should be -- I was very sympathetic,
22 very touched by the presentation but when I go

1 back through all of what we know and what we
2 have seen, I am not convinced that the
3 applicant has made a true case for granting of
4 the variance.

5 I am confused by what we are
6 looking for totally. I don't know whether the
7 deck is still an option, whether that stair is
8 necessary. I am confused about the
9 application for 1130. Again, the applicant
10 has made the case or tried to make the case
11 that they relied upon DCRA. I'm confused by
12 how much was shown, what was not shown, and
13 where we get the authority, where DCRA
14 actually signed off on this for them.

15 If they could make that case
16 better, I would be more than willing to listen
17 to it but right now I'm struggling because of
18 what I see on this document and what I know
19 from what has been submitted and what is
20 available to us.

21 MEMBER DETTMAN: Just to follow up
22 on Mr. Turnbull's comments, and I think I

1 share the Board's comments so far with respect
2 to at the end of the last hearing we
3 requested some documents in order to make a
4 more informed decision. We got some of them
5 and we didn't get some other ones.

6 Concerning the variance request
7 and the existing structure on the property and
8 the physical characteristics of the property,
9 there was mention about a nonconforming court
10 that contributed to lot occupancy that was
11 sort of couched as the extraordinary situation
12 but it never really went further than that.
13 I think the Board is leaning in the direction
14 of asking the applicant for some more
15 information.

16 That would be one area of concern
17 or interest that I have is that sort of
18 explain, take us through the three prongs of
19 the test and explain why this nonconforming
20 court that contributes to lot occupancy
21 warrants the relief that is being requested.

22 There was also -- I'm looking at

1 Exhibit 9 again, the May 25, 2007 zoning
2 denial determination letter from Bill Crews to
3 the appellant. There was this -- during the
4 hearing it came out that misrepresentations in
5 the building permit process could be
6 considered, as you say, Madam Chair, the
7 zoning history.

8 It could be considered an
9 extraordinary situation. At the end of the
10 hearing we really zeroed in on building permit
11 87210 as well as building permit 90350.

12 If you look at the transcript, the
13 Board requested to have the actual application
14 that was filled out for those two building
15 permits as well as the plans that were
16 associated with those two building permit
17 applications with DCRA's stamps of approval.

18 On January 11, 2008, the appellant
19 filed the requested material in part. What we
20 did receive is we received the application and
21 the approved plans for building permit 87210
22 which go to 1130 5th Street, N.W. However, we

1 did not receive the application, the filled-
2 out application, as well as the approved plans
3 for the other building permit, 90350, which go
4 to the improvements of the property -- I'm
5 sorry.

6 Those are the improvements of the
7 property at 1130 5th Street, N.W. We did
8 receive the information for 1132. However, we
9 did not receive all of the information for the
10 improvement at 1130. We did receive
11 information for building permit B 477360 which
12 go to the repair or reconstruction of the
13 nonconforming sleeping porch.

14 In the zoning denial determination
15 letter two misrepresentations are alleged.
16 One was that DCRA was not aware that the
17 appellant was going to put an addition on the
18 rear of 1132. They were not aware that the
19 appellant was going to demolish the existing
20 nonconforming sun porch and rebuild it which
21 would be in violation of the regs.

22 Based on the information we

1 received from appellant, it appears that there
2 wasn't a misrepresentation when it comes to
3 1132. At least I was satisfied based on the
4 testimony that the sun porch had been restored
5 and not reconstructed.

6 However, the question still
7 remains whether or not the addition at 1130
8 has been permitted by DCRA. The only thing
9 that we have that sort of shows something at
10 the rear of 1130 is the plat that was
11 submitted on January 11, 2008. That is
12 Exhibit D1. It shows something back there but
13 it is labeled with porch.

14 It doesn't indicate anything about
15 an addition. The building permit, which was
16 provided, doesn't indicate anything about an
17 addition but I do know that on the application
18 itself there is a spot that you can actually
19 check a box to indicate addition. In the
20 description of work that is another
21 opportunity for the applicant to actually
22 state that there is an addition.

1 Those are the documents that I
2 think are necessary in order to fully analyze
3 this case.

4 COMMISSIONER TURNBULL: I would
5 just agree totally with Mr. Dettman and just
6 point out also that the other part is the
7 whole deck issue. The deck issue has sort of
8 become a subservient issue to the addition and
9 the remodeling but the deck issue still is a
10 fairly significant aspect if that is going to
11 be built that should be included and needs to
12 be talked about in any kind of variance
13 consideration.

14 CHAIRPERSON MILLER: Others? I
15 just want to assert some of the areas that I
16 think the applicant should address. Certainly
17 one is all the factual issues that both Mr.
18 Dettman and Mr. Turnbull just reiterated. I
19 think in particular there is a serious
20 question with respect to 1130 whether that
21 addition has been permitted.

22 I don't want to start listing

1 things and then if I don't say everything that
2 they said that means it shouldn't be
3 addressed. I think that they did address the
4 factual documents in the record. I would like
5 to somewhat reiterate that the Board was open
6 to looking at this issue both with respect to
7 the property itself, the traditional way of
8 looking at a variance.

9 If there is something on the
10 property itself that would give rise to a
11 variance, you should make that argument. It's
12 not enough as far as I am concerned to say,
13 which is what we've heard, "Well, the property
14 is there now and, therefore, it's a practical
15 difficulty because we'll have to demolish if
16 we don't get a variance."

17 I don't believe you can make the
18 variance test that way. You have to address
19 -- we have to know did it get there in good
20 faith. If it got there because it was
21 permitted without being presented to DCRA,
22 then that is a fact that has to be dealt with.

1 We need to know all the facts for the
2 arguments.

3 If that attorney is going to make
4 a good faith reliance on DCRA argument, we
5 need to know what DCRA was shown and when and
6 how the applicant relied on DCRA. We've heard
7 a lot of different things like maybe the
8 applicant relied on their engineer and the
9 engineer made the mistake.

10 If that is the argument that is
11 going to be made, then I would suggest that
12 the applicant provide some case law or
13 something showing that is a permissible
14 unusual circumstance.

15 I think that pretty much covers
16 where this Board is coming from. Again, we
17 are sympathetic to what this applicant has
18 gone through and that is why we are giving you
19 the opportunity to address fully the variance
20 test with specific references to documents and
21 events and law so that this Board might be
22 able to make that kind of decision. Based on

1 what is in the record we are not prepared to
2 do that at this point.

3 I think unless I hear an objection
4 from the applicant that we ought to schedule
5 this for another decision meeting and put this
6 on our regular decision meeting date which
7 would be February 5. Then we need to set a
8 date by when the applicant would submit the
9 suggested filings.

10 When would that be, Mr. Moy? And
11 in time for the Board to be able to adjust to
12 all the love that I believe is going to be
13 presented there.

14 MR. MOY: The staff would suggest
15 to give ample time two weeks so staff is
16 proposing January 29, Tuesday, January 29th,
17 if that is acceptable.

18 CHAIRPERSON MILLER: Okay.

19 COMMISSIONER TURNBULL: Madam
20 Chair, is this a meeting or is this a
21 continuation of the hearing? How are we
22 looking at this?

1 CHAIRPERSON MILLER: Let's discuss
2 it. I'm under the impression that they could
3 respond to this in writing totally including
4 affidavits.

5 COMMISSIONER TURNBULL: Okay.

6 CHAIRPERSON MILLER: I think I
7 would give the applicant leave. If the
8 applicant determined that they would need a
9 hearing, we could schedule a hearing. I don't
10 foresee that. We don't have any opposing
11 parties.

12 We don't have any need for cross
13 examination or anything of that sort so I
14 believe we have kind of thrown out our
15 questions and the applicant should be able to
16 respond in writing.

17 COMMISSIONER TURNBULL: Okay.

18 CHAIRPERSON MILLER: Do you want
19 to reiterate then?

20 MR. MOY: Yes, Madam Chair. Once
21 again, the decision for the Board is
22 reschedule to the Tuesday of February 5th as

1 the regular public meeting in the month of
2 February with filings due by the applicant by
3 Tuesday, January 29th.

4 CHAIRPERSON MILLER: Thank you
5 very much. That concludes our meeting. Do we
6 have anything else on today's agenda for the
7 public meeting?

8 MR. MOY: No, ma'am.

9 CHAIRPERSON MILLER: Okay. Then
10 the meeting is adjourned. We'll break for
11 about five minutes and return for the hearing
12 this morning.

13 (Whereupon, at 12:09 p.m. the
14 meeting was adjourned.)
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